LIBRARY
SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
JUN 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 104

EDWARD A. WILD, JR. and LOUIS CORRADO,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT MONTE LEVY
Attorney for Petitioners
295 Madison Avenue
New York, New York 10017

TABLE OF CONTENTS

	PAGE
PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT	1-4
CONCLUSION	4
Certificate of Counsel	4

Cases Cited

Astro Cinema Corp., Inc. v. Mackell, 422 F.2d 293 (2nd Cir., 1970)	1, 2
Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2nd Cir. 1969), cert. den., 397 U.S. 920	2
Carroll v. City of Orlando, 311 F. Supp. 967 (M.D. Fla., 1970)	2
Chimel v. California, 395 U.S. 752 (1969)	3
Demich, Inc. v. Ferdon, 426 F.2d 643 (9th Cir., 1970)	2
Perez v. Ledesma, —— U.S. —— (1971), 39 LW 4214	3, 4
United States v. Alexander, 429 F.2d 1169 (8th Cir., 1970)	2
United States v. Fragus, 428 F.2d 1211 (5th Cir. 1970)	2
United States v. Marti, 421 F.2d 1263 (2nd Cir., 1970)	2
Williams v. United States, —— U.S. —— (1971), 39 LW 4365	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 104

EDWARD A. WILD, JR. and LOUIS CORRADO,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Edward A. Wild, Jr. and Louis Corrado, hereby petition for a rehearing of this Court's May 17, 1971 denial of a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, which had affirmed their convictions for mailing obscene materials (now reported at 422 F.2d 34).

The decision in the case at bar, despite the attempts of the Court below to reconcile it with the decision of a dif-

ferent panel of the same Court in *Bethview Amusement Corp.* v. *Cahn,* 416 F.2d 410 (2nd Cir. 1969), *cert. den.,* 397 U.S. 920, is basically irreconcilable therewith. Since then, the decisions of other Circuits, as well as of three-judge Federal Courts, have expressly or impliedly repudiated or distinguished away (on untenable grounds) the decision below.

Thus, in the three-judge Federal Court case of *Carroll* v. *City of Orlando,* 311 F. Supp. 967, 970 (M.D. Fla., 1970), the dissenting judge relied upon *Wild* in upholding his position, while the majority relied upon *Bethview.* Similarly, in *United States* v. *Alexander,* 429 F. 2d 1169 (8th Cir., 1970) the Eighth Circuit rejected the view that samples of materials could be taken at an obscenity arrest if only some of the titles seized had been before the officer who issued the warrant—while here the seizure had been made without any warrant whatsoever.

Conversely, the decision below has been cited with approval by the Fifth Circuit for the proposition that hard core obscenity may be seized without prior hearing [*United States* v. *Fragus,* 428 F. 2d 1211, 1212 (5th Cir., 1970)], a dangerous extension of *Wild.*

The Ninth Circuit, meanwhile, has distinguished *Wild* upon the tenuous basis that distribution and sale may be treated differently than material held for exhibition. *Demich, Inc.* v. *Ferdon,* 426 F. 2d 643, 645 (9th Cir., 1970).

The Second Circuit itself has apparently narrowed the rule of *Wild.* Thus, in *United States* v. *Marti,* 421 F. 2d 1263, 1271 (2nd Cir. 1970), it held that a warrantless seizure of an automobile on the ground that it was allegedly carrying obscene materials could not be justified, and that the evidence seized could not be admitted at trial. And in *Astro Cinema Corp., Inc.* v. *Mackell,* 422 F. 2d 293, 296 (2nd Cir. 1970), it further narrowed the decision below:

> "* * * We view *Wild* as merely saying that a particularized search for specific samples of slides or publications, designed to provide evidence for a subsequent obscenity prosecution, and not substantially restraining distribution of the material involved, does not violate *Marcus* or *A Quantity of Books.* * * *"

The continued existence of *Wild* as a precedent, if unreviewed by this Court, will thus continue to create confusion. While the Second Circuit itself narrows *Wild* (to a point unsupportable by the record and opinion below)[1], the majority of a three-judge Federal Court apparently rejects *Wild* altogether, and other Courts of Appeal rely upon expansions or contractions of *Wild*. Unless reviewed by this Court, *Wild* is likely to create a cancer in law enforcement. It has been productive of much confusion and varying results in its less than two years of existence, and should be reviewed by this Court.

In another aspect, too, this case deserves review. Though *Williams* v. *United States,* —— U.S. —— (1971), 39 LW 4365, precludes us from further argument of the *Chimel* v. *California,* 395 U.S. 752 (1969) point, we note that with this Court's dismissal of *Perez* v. *Ledesma,* —— U.S. —— (1971), 39 LW 4214, on procedural grounds, this Court no longer has before it the question of whether a prior adversary judicial determination of obscenity must be made before allegedly obscene materials may be seized without warrant as incident to an arrest, and used as evidence. This case squarely presents such an issue, con-

---

[1] The search below was not for specific samples. On the contrary, the officers were taking anything they saw "Related to [Wild's] business. Their photographic equipment, slides, circulars advertising his business, envelopes, things like that." (Doc. 16, p. 166).

tained in our Question 4. We submit that since this question was held worthy of review in *Perez,* it should be granted review herein. This question is now ripe for decision.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

HERBERT MONTE LEVY
Attorney for Petitioners
295 Madison Avenue
New York, New York 10017

Certificate of Counsel

HERBERT MONTE LEVY, counsel of petitioners Wild and Corrado, hereby certifies that the within petition is presented in good faith and not for delay, and that it is restricted to intervening circumstances of substantial and controlling effect, and to other substantial grounds available to petitioners although not previously presented.

HERBERT MONTE LEVY

Dated: June 2, 1971